

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROSA MIRIAM RAMOS

Claimant

VS.

U.S.D. NO. 233

Self-Insured Respondent

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Docket No. **1,039,336**

ORDER

Claimant requests review of the September 19, 2008 Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

ISSUES

The Administrative Law Judge (ALJ) found claimant did not meet her burden of proof that her low back complaints were related to the work incident on January 3, 2008.

Claimant requests review of whether the ALJ erred in finding that claimant had not met her burden of proof that her low back complaints were related to her work injury of January 3, 2008. Claimant argues from the onset of her injury she has complained of her entire back hurting.

Conversely, respondent initially argues this appeal should be dismissed for lack of jurisdiction as the issue being appealed is whether claimant should receive additional medical benefits, which is not a jurisdictional issue under K.S.A. 44-534a. In the alternative, respondent argues that claimant was provided medical treatment for her upper back and neck which resulted from the January 3, 2008 injury. Respondent further argues that claimant did not request medical treatment for her low back complaints until six weeks after the accident and there is no medical opinion that relates these low back complaints to the original injury. Therefore the ALJ's Preliminary Decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The first issue that must be addressed is whether the Board has jurisdiction to review the ALJ's Preliminary Decision. Generally, issues concerning medical treatment, including whether claimant is in need of additional treatment and, if so, whether the

treatment ordered by the ALJ is appropriate, are questions within the ALJ's jurisdiction to decide and are not reviewable by the Board on appeal from a preliminary hearing order. However, whether claimant's lumbar spine condition and need for surgery was directly attributable to the January 3, 2008, accident is an issue the Board may review on an appeal from a preliminary hearing decision because it gives rise to the jurisdictional issue of whether her injury and need for treatment arose out of and in the course of her employment with respondent.¹

It is undisputed that claimant suffered a work-related injury on January 3, 2008, after she spent the 8-hour work day bent over cleaning trash cans with soap and water. Respondent provided claimant with treatment for her neck and upper back. The disputed issue is whether she also injured her lumbar spine.

Claimant worked for respondent in the housekeeping department. On January 3, 2008, she spent the 8-hour day bent over cleaning trash cans with soap and water. As a result of that work, she developed pain in her back which she described as starting in her neck and head down to her hips. She told her supervisor about her complaints. She only had 30 minutes left of her shift, so she completed her workday.

The next day, January 4, claimant went to the emergency room. The emergency room records indicate that claimant complained of pain down her spinal column with the onset being the night before. She indicated her primary area of pain was her entire back. She testified when she described her pain to the emergency room personnel as being in her entire back, she meant that she was having pain from the back of her head down to her hips.

After claimant filled out an accident report on January 7, respondent sent her to the Olathe Occupational Medicine Clinic (OOM), where she complained of pain in her back. However, she was treated only for her upper back, neck and shoulders. She testified she did not know why she did not ask for treatment for her low back as well as her upper back. At the time, she had no problems with her feet. The records from OOM indicate only that claimant complained of pain in her upper back. She was diagnosed with a thoracic/trapezius strain, sent to physical therapy, prescribed medication, and put on modified duty. Although OOM's records of January 14 and January 21 indicate that claimant had mild tenderness to palpation over the upper lumbar muscles, her diagnosis and treatment continued to be for her thoracic and trapezius strains.

On February 8, 2008, claimant returned to the emergency room, complaining of a burning sensation in her feet and swollen ankles. She was diagnosed with paresthesia, possibly the result of a drug reaction to the medicine she had been prescribed. On February 11, claimant was seen by Dr. Charles Smith of OOM. She described her

¹ See K.S.A. 44-534a(a)(2) and K.S.A. 2005 Supp. 44-551(b)(2)(A).

condition as being so bad that she could not walk or stand. Although Dr. Smith thought it was possible that claimant's paresthesia was a reaction to her medication, he also stated that he thought "there is a strong possibility that something else could be going on and that she needs to be evaluated through her personal medical doctor."² Dr. Smith continued to treat claimant's upper back and shoulders, but he indicated that claimant's problems with her feet were not work related.

Claimant returned to the emergency room on March 26, 2008, complaining of bilateral foot swelling and numbness, as well as low back pain stemming from housekeeping and constant bending over.

Because Dr. Smith would not treat claimant's foot problems, she went to see her personal physician, Dr. V. Carlos Palmeri. Dr. Palmeri sent claimant for tests, including an MRI of her lumbar spine, which was performed on April 9, 2008. The MRI showed that claimant had degenerative disc bulging and fairly advanced degenerative facet arthropathy at L4-5 with mild acquired canal stenosis. Dr. Palmeri sent claimant to Dr. Paul O'Boynick, who performed a lumbar myelogram on April 22. The myelogram showed significant central spinal stenosis at L4-5. Dr. Paul O'Boynick recommended a posterior lumbar decompressive laminectomy with lumbar discectomy at L4-5. Respondent denied claimant's request for medical treatment.

Claimant sought treatment for her lumbar spine and after a preliminary hearing, the ALJ held:

In this claim for injuries to claimant as school housekeeper in low back, legs and feet from an episode of washing trash cans at school right after New Years were disputed. [sic] But she is receiving treatment for upper back complaints from this same cause. A large amount of testimony and records were present and the matter taken under advisement while her authorized treatment proceeds.³

An application for review by the Workers Compensation Board was filed on May 27, 2008. The Board entered a decision on August 11, 2008, stating it did not have jurisdiction to review the ALJ's preliminary decision because the ALJ had taken the issue under advisement. Simply stated there was no decision to review.

A second preliminary hearing was held on September 18, 2008, before Administrative Law Judge Marcia L. Yates Roberts which is the subject of this review.

² P.H. Trans., Cl. Ex. 1 at 33.

³ ALJ Preliminary Decision (May 16, 2008).

Claimant testified she had low back surgery on June 3, 2008, which was performed by Dr. O'Boynick. At the time of the preliminary hearing, claimant had been off work since her surgery. She testified she was to return to work on September 24, 2008.

On cross examination, claimant testified:

Q. Did you tell Dr. Palmeri about the problems that you had with your lower back?

A. Not only in the lower back, in the entire back.

Q. Do you know why Dr. Palmeri didn't make any notations about any problems you had in the lower part of your entire back?

A. Dr. Palmeri performed only examinations on my feet, and he told me that it was the same problem as in my back.

Q. Do you plan to return to work at the school district on the 24th?

A. No, I don't know. I don't feel well yet.⁴

The ALJ determined:

After hearing the testimony and statements of counsel, reviewing the prior preliminary hearing transcripts with attached exhibits, medical records attached to the records deposition of Starr Wilbert and additional medical records offered as exhibits at this preliminary hearing, the court finds that Claimant has not met her burden of proof that her low back complaints are related to the work event on January 3, 2008. Therefore the requested relief is denied.

After claimant reported her accidental injury to respondent she was sent for treatment and her complaints were limited to her neck and upper back. She was provided treatment for those complaints. And she was sent for physical therapy and did not make complaint of low back or foot problems. When claimant initially complained of foot complaints, Dr. Smith concluded it was not related to work. When the claimant finally sought treatment with Dr. O'Boynick she did not indicate on the intake form that her low back problem arose from a work-related matter.

Based upon the medical evidence compiled to date, this Board Member concludes that claimant has not met her burden of proof to establish that her lumbar spine condition was caused by her work-related accident.

⁴ P.H. Trans. (Sep. 18, 2008) at 17-18.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Marcia L. Yates Roberts dated September 19, 2008, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of December 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent
Marcia L. Yates Roberts, Administrative Law Judge

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2007 Supp. 44-555c(k).